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No. 01-684

In the Supreme Court of the United States

UNITED STATES COURT OF INTERNATIONAL TRADE,
PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit properly exercised its mandamus authority to halt criminal contempt proceedings initiated by the United States Court of International Trade (CIT) against federal officials who had participated in the decision to take an appeal from an earlier order of the CIT in the same case.

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OPINIONS BELOW

The opinion of the court of appeals granting mandamus relief (Pet. App. 1a-4a) is unreported. The opinions of the United States Court of International Trade (CIT) appointing a special prosecutor (App., *infra*, 6a-9a) and directing the United States to show cause why it should not be formally cited for contempt of court (App., *infra*, 1a-5a) are unreported. An earlier opinion of the court of appeals (Pet. App. 5a-8a) is unreported. Earlier opinions of the CIT (Pet. App. 9a-20a, 21a-61a) are reported at 122 F. Supp. 2d 1375 and 116 F. Supp. 2d 1324.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2001. The petition for a writ of certiorari was filed on November 8, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). There is a substantial question whether petitioner has properly invoked this Court's jurisdiction. See pp. 18-22, *infra*.

STATEMENT

1. The contempt proceedings in this case arose out of litigation over petitions filed by Save Domestic Oil, Inc. (SDO), a consortium of independent domestic crude petroleum producers, with the United States Department of Commerce's International Trade Administration (ITA) for imposition of antidumping and countervailing duties on oil from four foreign countries. The Tariff Act of 1930, as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, requires the ITA to initiate an investigation if it determines that such a "petition has been filed by or on behalf of the industry." 19 U.S.C. 1671a(c)(1)(A)(ii), 1671a(c)(2) (countervailing duties); 19 U.S.C. 1673a(c)(1)(A)(ii), 1673a(c)(2) (antidumping). If the ITA determines that the petition has not been filed "by or on behalf of the industry" within the meaning of the Act, it is required to "dismiss the petition, terminate the proceeding, and notify the petitioner in writing of the reasons for the determination." 19 U.S.C. 1671a(c)(3); see also 19 U.S.C. 1673a(c)(3). The ITA dismissed SDO's petition on the ground that it did not have the statutorily-required support of the domestic industry. 64 Fed. Reg. 44,480 (1999). After surveying the industry, the ITA determined that the relevant opposition ranged from "65 to 68 percent" of the industry. *Id.* at 44,482.

SDO appealed the ITA's decision to the United States Court of International Trade (CIT), and the case was assigned to Judge Thomas J. Aquilino, Jr. On September 19, 2000, the CIT vacated the agency's decision. Pet. App. 21a-61a. The court held that the ITA had applied incorrect legal standards in determining whether SDO's petition had the required industry support, *id.* at 35a-59a, and that the agency's dismissal of the petition therefore "was not in accordance with law," *id.* at 60a. The CIT remanded the case to the agency "for contemplation of commencement of a preliminary [antidumping] investigation," and gave the government "60 days from the date hereof for this purpose." *Ibid.* The court stated that "[i]f the result of this remand is not initiation of [a] preliminary investigation[] * * *, the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period." *Id.* at 61a.

2. The government appealed the CIT's order to the United States Court of Appeals for the Federal Circuit. The government also requested a stay pending appeal from the CIT and moved to extend the time in which the agency was required to respond to the CIT's decision. On November 27, 2000, the CIT denied both motions. Pet. App. 9a-20a. On that same date, the government filed a motion for a stay pending appeal in the Federal Circuit. On December 7, 2000, after no action had been taken on its stay motion, the government filed a motion in the court of appeals seeking a temporary stay pending disposition of its stay motion. The Federal Circuit took no action on either of the government's stay motions during the period of time that the case was pending in the court of appeals.

On July 31, 2001, the court of appeals issued an order dismissing the government's appeal for lack of

jurisdiction. Pet. App. 6a-8a. The court stated that "[a]s a general matter, remands to administrative agencies are interlocutory orders and are not appealable because they do not meet the requirement of finality." *Id.* at 7a. Although the court of appeals recognized that "certain remand orders have been determined to meet the finality requirement," it held that the CIT's order in this case did not fall within "the small class of decisions excepted from the final judgment rule." *Ibid.* The court explained that because the CIT had "remanded to Commerce for *contemplation* of commencement of a preliminary investigation," the remand order "did not conclusively determine a disputed question." *Id.* at 8a. The court of appeals further held that the government's request for a stay was moot, and it ordered each side to bear its own costs. *Ibid.*[1]

Upon receiving notice of the Federal Circuit's decision, the government requested a seven-day extension of time from the CIT in which to respond to the September 19, 2000, remand order. The government explained that the requested extension of time was necessary for the newly-confirmed Assistant Secretary

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[1] The government argued in the court of appeals that the CIT's September 19, 2000, remand order satisfied the finality requirement of 28 U.S.C. 1295(a)(5). The government explained that if the ITA applied the legal standards set forth in the remand order, and concluded that under those standards an investigation was required, the ITA would not be able to appeal from its own decision to commence an investigation and the disputed legal issue might evade appellate review. Cf. *Dambach* v. *Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000) (order remanding to an agency is appealable "when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade our future review").

for Import Administration to review the staff analysis that had been prepared in response to the court's remand order. The CIT granted the requested extension of time. App., *infra*, 3a-4a. The court also stated, however, that neither the government's motion, "nor anything else on the record of this case to date, dispels the * * * inability of the court to conclude that the defendant has not been dilatory and contemptuous." *Ibid.* The court's order further stated that "the defendant is also hereby directed to appear before the undersigned [judge] in courtroom 3 at 11 a.m. on that date [August 10, 2001] to show cause, if there be any, why it should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000." *Ibid.*

3. At the show-cause hearing on August 10, 2001, the CIT alluded for the first time to the possibility that individual government officers and employees might be held in criminal contempt. The CIT began the hearing by reading the following statement:

> We convene today pursuant to the Order to Show Cause filed in this matter on Monday August 6, 2001, which has engendered two motions; one by the defendant for reconsideration of that order. The other motion is the Court's own, to wit: That David M. Cohen, A. David Laifer, Lucius B. Lau, Robert J. Heilferty, and all those other officers and employees of the Defendant, United States Government, who, within the meaning of Sections 401 and 402 of Title 18 of the United States Code, have not obeyed and/or who have willfully resisted lawful compliance with the Court's Order of Remand of September 19, 2000, to the International Trade Administration, U.S. Department of Commerce, draw near and be

heard as to why they, and each of them, should not be punished to the extent permitted by law.

Tr. 3.[2]

During the hearing, the CIT repeatedly requested government counsel to provide the names of those officials at the Department of Justice and the Department of Commerce who had participated in the government's decision to pursue an appeal of the remand order. See, *e.g.*, Tr. 18-22, 30-31. The court inquired, for example, whether "the Solicitor General himself" had participated in the decision to appeal and stated that this was "a question, of course, that will require an answer." Tr. 7.

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[2] The CIT's August 6 order directed "the defendant" to show cause "why *it* should not be formally cited and sanctioned for contempt of court." App., *infra*, 4a (emphasis added). As the caption of the CIT's August 6 order (*id.* at 1a) makes clear, the United States rather than any individual government attorney is the "defendant" in the underlying case. After the CIT indicated at the beginning of the August 10 hearing that the court intended to address the possibility of punishing individual federal officers and employees, government counsel stated that he was prepared to address the question whether the United States should be held in contempt, but that he did not believe the government had received adequate notice of the court's intention to consider contempt proceedings against individual government officials. Tr. 3-5. Counsel further noted that he appeared in the court as the attorney of record for the United States but did not represent other government attorneys in their individual capacities. Tr. 17. The CIT stated, however, that in its view the order read into the record at the beginning of the August 10 hearing "was simply a furtherance of" the August 6 order. Tr. 5; see Tr. 21 (CIT states that "the Court's Order to Show Cause on Monday [August 6] was sufficient notice of the direction that this particular session was to take").

The government has lodged a copy of the transcript of the August 10, 2001, hearing with the Clerk of this Court.

Lead counsel for the government stated that he was not sure that he knew all the officials involved in the decision to appeal and that, even as to names of which he was aware, he believed it necessary to postpone answering the CIT's inquiries pending more extended consultation with responsible officials at the Department of Justice. See Tr. 18-22. An attorney for the Department of Commerce who also attended the hearing stated that he was in no better position to provide the requested information. Tr. 35. In response, the CIT ordered both government counsel incarcerated pending a further hearing to commence at 4:00 P.M. that same day. See Tr. 37-38, 41. At the later hearing, the CIT received the government's commitment to provide the requested names. Tr. 45-46. The CIT released the two attorneys from custody and directed the government to provide, by no later than Friday, August 17, 2001, the names of all federal officers and employees who had participated in the decision to appeal the remand order. Tr. 46.[3]

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[3] As petitioner points out (Pet. 25 n.7), the two individual government attorneys who were incarcerated at the August 10 hearing have filed notices of appeal challenging the CIT's action. Petitioner contends (*ibid.*) that "[t]hose filings (by mail) appear to be yet another example of practice on the fringe" because the notices of appeal were received by the CIT Clerk after the 60-day period for appeal had expired. CIT Rule 5(e) provides, however, that "a pleading or other paper mailed by certified or registered mail properly addressed to the clerk of the court, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of mailing." The notices of appeal filed by the two individual attorneys were sent by certified mail, return-receipt requested, on October 9, 2001 (the 60th day after the August 10 hearing) and are therefore timely under the CIT's Rules. The CIT's docket sheet indicates that both notices of appeal were deemed filed on October 9.

On August 17, 2001, the government filed its response to the inquiries made by the CIT at the August 10 hearing. *Inter alia*, that filing identified, by name and title, 12 current and former officials of the Department of Justice (including the former Solicitor General) and eight current and former officials of the Department of Commerce who had participated in the decision to take the appeal in the case. In a separate filing submitted to the CIT on the same date, the government responded to the court's show-cause order, arguing that under the circumstances of the case there was no basis for initiating criminal contempt proceedings against those individuals or any other Department of Commerce or Department of Justice official. The government also argued that, under this Court's decision in *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787 (1987), it would be inappropriate for the CIT to appoint a private prosecutor without first affording the Attorney General of the United States or the Assistant Attorney General for the Criminal Division an opportunity either to (1) assume responsibility for investigating and prosecuting the alleged criminal offense, or (2) assign the matter to a United States Attorney. Also on August 17, 2001, the government filed a petition for a writ of mandamus in the Federal Circuit, asking that court to vacate the CIT's August 6 and August 10 orders insofar as those orders had initiated criminal contempt proceedings and to prohibit any further criminal contempt proceedings in this matter.

4. On August 21, 2001, the CIT ordered the appointment of a special prosecutor. App., *infra*, 6a-9a. Both the caption and the body of that order listed by name the Justice and Commerce Department officials who had been identified by the government as participants

in the decision to appeal the CIT's September 19, 2000, remand order. *Id.* at 6a, 8a. The CIT named Terence P. Stewart of Washington, D.C., as special prosecutor "to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand of September 19, 2000." *Id.* at 8a. In light of the CIT's appointment of a special prosecutor, the government filed a supplemental petition for mandamus in the Federal Circuit.

5. On August 23, 2001, the court of appeals temporarily stayed further proceedings in the matter. App., *infra*, 10a-11a. On September 28, 2001, the court granted the government's petition for mandamus. Pet. App. 1a-4a.

While acknowledging that "mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power," the court of appeals "agree[d] with the United States that its determination to file an appeal of the Court of International Trade's remand order was not under the circumstances sufficient to serve as a basis for contempt proceedings." Pet. App. 3a. The court explained that

> [p]recedent regarding the appealability of remand orders such as that in the present case is not crystal clear, and the government's arguments offered in support of appealability were not frivolous. Contempt proceedings should not be initiated unless in response to action that is clearly unjustified. Filing a notice of appeal and seeking a stay in this case were not clearly unjustified.

Ibid. The court of appeals also observed that under Federal Circuit precedent, "some remand orders may

be considered final for purposes of appellate jurisdiction." *Ibid.*; see *id.* at 3a-4a (citing cases). The court concluded that "[t]he trial court's orders to initiate contempt proceedings were * * * an abuse of discretion," and it granted the government's mandamus petition "to the extent that the Court of International Trade is directed to vacate its orders initiating criminal contempt proceedings." *Id.* at 4a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Because "the contempt power * * * is uniquely liable to abuse," *International Union, United Mine Workers of America* v. *Bagwell*, 512 U.S. 821, 831 (1994) (internal quotation marks omitted), "only '[t]he least possible power adequate to the end proposed' should be used in contempt cases," *United States* v. *Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson* v. *Dunn*, 19 (6 Wheat.) U.S. 204, 231 (1821)); see also *Young* v. *United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 801 (1987). That principle of restraint applies with special force to criminal contempt proceedings against attorneys, given that "[c]riminal contempt of court is a dark stain on an attorney's record." *United States* v. *Mottweiler*, 82 F.3d 769, 770 (7th Cir. 1996).

In this case, the court of appeals exercised appropriate vigilance by halting unwarranted criminal contempt proceedings. The court recognized that the CIT had abused its authority by instituting contempt proceedings because the actions by the government and its officials in taking the appeal "were not clearly unjustified." Pet. App. 3a. As the court of appeals explained,

"[p]recedent regarding the appealability of remand orders such as that in the present case is not crystal clear, and the government's arguments offered in support of appealability were not frivolous." *Id.* at 3a.[4] The court of appeals thus properly rejected the proposition that, simply because an appeal is ultimately dismissed for lack of jurisdiction, the government and the individual officials who participated in the decision to take the appeal may be prosecuted for criminal contempt based on their "disobedience" to the underlying order from which the appeal was taken.

It was, moreover, particularly appropriate for the court of appeals to resolve the threshold question in the contempt proceeding regarding the propriety of the prior appeal, because the conduct involved in the taking of the appeal (following the filing of the notice of appeal) occurred before the court of appeals, not the CIT. Indeed, the CIT, by instituting contempt proceedings on that ground, would appear to have usurped the authority of the court of appeals to determine whether the appeal was frivolous. See Fed. R. App. P. 38.

In addition to the ground on which the court of appeals relied, the CIT's appointment of a special prosecutor was improper because the CIT failed to provide responsible Department of Justice officials an opportunity to assume responsibility for the criminal investigation and any ensuing prosecution. This Court in *Young* explained that "a court ordinarily should first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. Such a

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[4] The Federal Circuit panel that dismissed the initial appeal did not find that the appeal was frivolous, and it ordered each side to bear its own costs. Pet. App. 8a.

procedure ensures that the court will exercise its inherent power of self-protection only as a last resort." 481 U.S. at 801. Although the government brought *Young* to the CIT's attention in its August 17, 2001, filing (see p. 8, *supra*), the CIT's August 21 order appointing a special prosecutor (App., *infra*, 6a-9a) did not cite *Young* or explain the court's refusal to refer the matter to the Department of Justice.[5]

2. Petitioner suggests that the court of appeals' ruling permits parties in cases before the CIT "to completely disregard or willfully disobey lawful orders

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[5] On August 30, 2001, in response to the government's petition for mandamus, the CIT filed in the Federal Circuit a document styled "Statement on Behalf of the United States Court of International Trade." That Statement likewise did not cite *Young* or directly address the government's contention that the matter should first have been referred to the Department of Justice. The CIT's filing did, however, characterize the government's mandamus petition as "an extraordinary indication that the government will not assist the CIT in securing the just, speedy, and inexpensive determination of this matter mandated by CIT Rule 1." *Id.* at 8. The court further stated that "[t]he Commerce and Justice Departments have been and continue to be partisans in this matter." *Ibid.* Those assertions provide no basis for the CIT's refusal to adhere to the procedure described in *Young*. The Department of Justice is fully authorized to investigate and prosecute individual federal officers and employees who are believed to have committed criminal offenses. See 28 U.S.C. 535(a) ("The Attorney General and the Federal Bureau of Investigation may investigate any violation of title 18 involving Government officers and employees."). Accordingly, as the government's reply in the Federal Circuit pointed out, "it is for the Department of Justice in the first instance to determine whether the involvement of Justice Department attorneys in representing the United States in this matter precludes the Department from accepting a criminal referral." Reply to Statement on Behalf of United States Court of International Trade at 5 (Sept. 4, 2001).

and decisions issued in those cases." Pet. 14; see Pet. 11-14. But the government did not disregard the CIT's order in this case; it took an appeal. The government also filed two stay requests in the Federal Circuit, neither of which was acted on during the pendency of the appeal. See p. 3, *supra*. In halting the criminal contempt proceedings initiated by the CIT, the court of appeals did not grant the government or its officers and employees a license to disregard judicial rulings. Rather, the court simply recognized the common-sense proposition that the government is entitled to appeal an adverse ruling even if victory is not certain, and that the officials who participate in the decision to take the appeal may not be charged with criminal contempt simply because the government's arguments on appeal prove unsuccessful.

Petitioner also suggests (Pet. 18, 19) that the court of appeals erred by focusing on the filing of the appeal as the basis for the CIT's initiation of a criminal contempt investigation. Both the caption and the body of the CIT's August 21 order appointing a special prosecutor, however, listed by name the 12 Justice and eight Commerce Department officials who had been identified by the government as participants in the decision to pursue an appeal. App., *infra*, 6a, 8a. The special prosecutor's assigned task was "to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand." *Id.* at 8a. Although the CIT did not preclude the special prosecutor from extending his inquiry beyond the government's decision to appeal the remand order, the court's August 21 order and the events preceding it reflected a primary focus on the

decision to pursue an appeal, and on the federal officers and employees who had participated in that decision.

In any event, petitioner's suggestion that the court of appeals misconstrued the nature of the criminal proceedings instituted in this case raises no issue of general importance warranting this Court's review. Petitioner does not appear to contest the court of appeals' holding that the decision by government officials to pursue a non-frivolous but ultimately unsuccessful appeal cannot reasonably be regarded as an act of criminal contempt. Petitioner's passing suggestion that the court of appeals failed to recognize and address an alternative ground for the CIT-initiated investigation raises a purely factbound challenge to the Federal Circuit's disposition of this case.

3. Petitioner contends (Pet. 15-21) that the court of appeals lacked jurisdiction to issue a writ of mandamus to the CIT. That argument lacks merit.

It has long been settled that the courts of appeals possess plenary equitable authority under the All Writs Act, 28 U.S.C. 1651, to issue writs of mandamus "when there is 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). See also *La Buy* v. *Howes Leather*, 352 U.S. 249, 254-260 (1957); *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). There is nothing unique about the Federal Circuit that restricts or implicitly limits that broad equitable authority. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (establishing Court of Appeals for the Federal Circuit as an Article III court). Nor is there anything about the issue in this case—the propriety of criminal contempt proceedings against specific government officials—that insulates it from mandamus review in appropriate circumstances. Cf. *In re: Calmar, Inc.*, 854

F.2d 461 (Fed. Cir. 1988) (granting mandamus where district court clearly abused its discretion in sanctioning counsel).

In asserting that the Federal Circuit lacked jurisdiction to issue a writ of mandamus in this case, petitioner relies heavily on the general principle that appellate jurisdiction does not typically extend to review of interlocutory orders by lower courts. See Pet. 16-17. That principle, however, does not limit the authority of the federal courts of appeals to issue writs of mandamus. Indeed, such writs are employed precisely to correct abuses of authority that would otherwise be unreviewable until after a final judgment.

Thus, in *La Buy*, *supra*, this Court rejected an argument strikingly similar to the one asserted by petitioner here. Responding to a district judge's contention that "the power of the Courts of Appeals does not extend to the issuance of writs of mandamus to review interlocutory orders except in those cases where the review of the case on appeal after final judgment would be frustrated," 352 U.S. at 254, the Court stated that the "question of naked power has long been settled by this Court," *id.* at 255. The Court confirmed that "[s]ince the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." *Ibid.* While disavowing any intent "to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders," *ibid.*, the Court held that, under the circumstances of the case, the court of appeals' issuance of writs of mandamus was an appropriate exercise of that court's discretion, *id.* at 255-260.

Contrary to petitioner's contention (Pet. 17), the Federal Circuit's prior determination (Pet. App. 5a-8a) that it lacked appellate jurisdiction to review the CIT's remand order in no way implies that the court lacked jurisdiction to issue a writ of mandamus directing the CIT to vacate its orders initiating criminal contempt proceedings. The pertinent language of 28 U.S.C. 1295(a)(5) is substantively indistinguishable from the language of 28 U.S.C. 1291—which limits appellate review to "final decisions of the district courts of the United States"—but the All Writs Act permits interlocutory intervention to correct a "usurpation of judicial power or a clear abuse of discretion." *Schlagenhauf*, 379 U.S. at 110. There was simply no claim in the first appeal that the CIT's remand order involved the sort of clear abuse or usurpation of authority that would support the exercise of the court of appeals' supervisory mandamus jurisdiction even if the Federal Circuit did not have jurisdiction of an appeal from the CIT's remand order.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate *in aid of their respective jurisdictions* and agreeable to the usages and principles of law." 28 U.S.C. 1651(a) (emphasis added). Apparently relying on the underscored language, petitioner argues (Pet. 18) that Section 1651 "requires a primary basis of jurisdiction in need of [the All Writs Act's] secondary aid." But because the Court of Appeals for the Federal Circuit has jurisdiction to review final decisions by the CIT, see 28 U.S.C. 1295(a)(5); see also Pet. App. 11a (CIT recognizes that the Federal Circuit has "exclusive jurisdiction of an appeal from a final decision of the Court of International Trade"), that requirement is satisfied here.

See *La Buy*, 352 U.S. at 255. The Federal Circuit would have jurisdiction under 28 U.S.C. 1295(a)(5) over any final decision of the CIT, both in the civil case that was remanded to the ITA and in the criminal contempt proceedings themselves.

In the circumstances of the present case, moreover, it is particularly appropriate to regard the court of appeals' issuance of mandamus relief as being "in aid of" that court's jurisdiction. As the Federal Circuit has recognized, a court of appeals does have jurisdiction to review a remand order "when there is a statutory interpretation that will affect the remand proceeding and that legal issue might evade [the court of appeals'] future review." *Dambach* v. *Gober*, 223 F.3d 1376, 1379 (Fed. Cir. 2000); see also Pet. App. 3a ("some remand orders may be considered final for purposes of appellate jurisdiction"); *id.* at 7a ("certain remand orders have been determined to meet the finality requirement"). The court of appeals' ability to exercise effective review over those remand orders that *are* subject to immediate appeal (as well as other interlocutory rulings that are appealable under the "collateral-order" doctrine, see, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468-469 (1978); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949)) would obviously be imperiled if parties who sought immediate appellate review risked criminal contempt proceedings in the event that their reasonable judgments as to the appealability of particular orders turned out to be wrong.

By issuing a writ of mandamus in this case, the court of appeals foreclosed a criminal contempt proceeding that not only could have led to punishment of government counsel for taking a particular appeal that the court of appeals found not to be frivolous, but that also

might well have deterred future litigants from properly invoking that court's appellate jurisdiction. The evident threat to the Federal Circuit's performance of its statutory function that the criminal contempt proceedings here would have posed further supports the conclusion that the court of appeals' issuance of mandamus relief was "in aid of" its jurisdiction within the meaning of 28 U.S.C. 1651(a).

4. Relying on *Will* v. *United States*, 389 U.S. 90 (1967), petitioner contends (Pet. 21-23) that the Federal Circuit's mandamus order should be reversed because the court did not adequately explain the basis for its decision. In *Will*, this Court reversed a writ of mandamus based in part on the "failure of the Court of Appeals to attempt to supply any reasoned justification of its action." 389 U.S. at 104. Here, by contrast, the Federal Circuit supplied a succinct explanation for its conclusion that the government's actions could not support the initiation of criminal contempt proceedings. The court of appeals observed that "[p]recedent regarding the appealability of remand orders * * * is not crystal clear," Pet. App. 3a; it found that the government's decision to take an appeal was "not clearly unjustified" under the circumstances of this case, *ibid.*; and it concluded on that ground that "the determination to seek review of the remand order in this case, and the government's request for a stay of that remand order, cannot serve as a basis for criminal contempt proceedings," *id.* at 4a. No further analysis or explanation was required.

5. Finally, for two distinct reasons, there is a substantial question whether this Court has jurisdiction to consider the certiorari petition filed in this case. For those reasons as well, the petition should be denied.

a. As amended in 1996, Federal Rule of Appellate Procedure 21(a)(1) states that, when a party petitions for a writ of mandamus directed to a court, "[a]ll parties to the proceeding in the trial court other than the petitioner are respondents for all purposes." Rule 21(b)(4) states that "[t]he court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals." The Advisory Committee Notes accompanying the 1996 amendments to Rule 21 explain:

> In most instances, a writ of mandamus or prohibition is not actually directed to a judge in any more personal way than is an order reversing a court's judgment. Most often a petition for a writ of mandamus seeks review of the intrinsic merits of a judge's action and is in reality an adversary proceeding between the parties. See, *e.g.*, *Walker v. Columbia Broadcasting System, Inc.*, 443 F.2d 33 (7th Cir. 1971). In order to change the tone of the rule and of mandamus proceedings generally, the rule is amended so that the judge is not treated as a respondent. The caption and subdivision (a) are amended by deleting the reference to the writs as being "directed to a judge or judges."

The Advisory Committee Notes further explain that "[b]ecause it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to

invite an *amicus curiae* to provide a response to the petition."[6]

The clear purpose and effect of the 1996 amendments to Rule 21 is to change the former practice under which the trial judge whose ruling was the subject of a mandamus petition was treated as a party in the court of appeals. Because neither the CIT nor the individual judge was a party to the proceedings in the Federal Circuit, it would seem to follow that neither is a proper petitioner in this Court. See 28 U.S.C. 1254(1) (authorizing this Court to review cases in the courts of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case").[7]

b. Section 518(a) of Title 28 of the United States Code provides that, "[e]xcept when the Attorney General in a particular case directs otherwise, the Attorney

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[6] The Federal Circuit did not expressly invite or order the CIT judge, pursuant to Federal Rule of Appellate Procedure 21(b)(4), to file a response to the government's mandamus petition. The court of appeals' August 23, 2001, order stated that "[a]ny respondent who wishes to respond [to the mandamus petition] may do so within 10 days," App., *infra*, 10a; but under Rule 21(a)(1), the "respondents" in a proceeding of this character are "[a]ll parties to the proceeding other than the petitioner." The August 23 order does, however, reflect that it was served both on the "Court of International Trade, Judge," and on the "Court of International Trade, Clerk." App., *infra*, 11a. The CIT submitted within the ten-day period a filing captioned "Statement on Behalf of the United States Court of International Trade." See note 5, *supra*.

[7] The court of appeals' order in the mandamus proceeding was addressed to the CIT, directing it to "vacate its orders initiating criminal contempt proceedings." Pet. App. 4a. That form of the order, however, does not render the CIT a party to the case, any more than an appellate court's issuance of a mandate to a trial court at the conclusion of an appeal as of right renders the trial court a party to the appeal.

General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court * * * in which the United States is interested." The Attorney General has in turn delegated that authority and responsibility for "[c]onducting, or assigning and supervising, all Supreme Court cases, including * * * petitions for * * * certiorari," to the Solicitor General, acting "in consultation with each agency or official concerned." 28 C.F.R. 0.20.

In *United States* v. *Providence Journal*, 485 U.S. 693, 707-708 (1988), this Court held that the United States was "interested," within the meaning of 28 U.S.C. 518(a), in a case in which a federal district court had appointed a private attorney to prosecute a criminal contempt, even though the matter was initiated at the direction of the district court and was "brought to vindicate the authority of the Judiciary and to punish disobedience of a court order." The Court specifically rejected the argument, advanced by the Solicitor General, that Section 518(a) addressed only the interests of the Executive Branch. 485 U.S. at 701. The Court observed that "Congress is familiar enough with the language of separation of powers that we shall not assume it intended, without saying so, to exclude the Judicial Branch when it referred to the 'interest of the United States.'" *Ibid.* The Court also held that the Solicitor General's refusal to authorize a certiorari petition in such a case "does not interfere with the Judiciary's power to protect itself." *Id.* at 702-703. The Court explained that "[w]here the majority of a panel of a court of appeals * * * itself has decided in favor of the alleged contemnor, the necessity that required the appointment of an independent prosecutor has faded and, indeed, is no longer present." *Id.* at 703.

Although the petitioner in this case is the CIT rather than the independent prosecutor, the reasoning of *Providence Journal* would appear to be fully applicable here. The CIT has neither sought nor received the authorization of the Solicitor General to file a certiorari petition. In such circumstances, under *Providence Journal*, the Court lacks jurisdiction in this case. See 485 U.S. at 708; *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 99 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
JACOB M. LEWIS
CHARLES W. SCARBOROUGH
Attorneys

DECEMBER 2001

APPENDIX A

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 99-09-00558

SAVE DOMESTIC OIL, INC., PLAINTIFF

v.

UNITED STATES, DEFENDANT

AND

API AD HOC FREE TRADE COMMITTEE *ET ALIA*,
INTERVENOR-DEFENDANTS

Dated: Aug. 6, 2001

MEMORANDUM & ORDER

AQUILINO, Judge: On November 27, 2000, this court in denying defendant's motion(s) for leave to appeal from its interlocutory order of remand to the International Trade Administration, U.S. Department of Commerce ("ITA"), per slip opinion 00-158, was

> unable to conclude that the defendant [wa]s attempting to proceed in good faith as opposed to in further delay of final determination of plaintiff's prayer for relief if not in contempt.

24 CIT _____, _____, 112 F. Supp. 2d 1375, 1381. Indeed, on August 3, 2001, the defendant served and filed a Second Motion for Extension of Time in which

the Department of Commerce May Respond to the Court's Order of September 19, 2000, appended to which is an order of the U.S. Court of Appeals for the Federal Circuit dated July 31, 2001 and holding that the attempted appeal and concomitant motion for a stay of this court's order by the defendant, as well as by intervenor foreign and multinational oil companies, was baseless.

The interlocutory order in question issued pursuant to slip opinion 00-120, 24 CIT _____, 116 F. Supp. 2d 1324 (2000), familiarity with which is presumed herein. It stated:

> This case is hereby remanded to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the [International Trade Commission] ITC) in accordance with law . . . . The defendant may have 60 days from the date hereof for this purpose. To the extent, in the exercise of its sound discretion during that time, the agency determines to reconsider its analysis of any of the threshold issues raised by the petition, including the nature of SDO's domestic product *vis-à-vis* that of other domestic producers and support for, and opposition to, the petition on the part of domestic producers and workers, the ITA may call upon the interested parties to supplement the record, and also upon the U.S. Departments of Labor and Energy for relevant, publicly-available data not yet part of the record. If the stated opposition of the API Ad Hoc Free Trade Committee is still sought to be taken into account, the agency is hereby directed to consider the facts and circumstances of the business of each

> Committee company, standing on its own, including most necessarily that particular company's imports of crude petroleum oil from Iraq, Mexico, Saudi Arabia or Venezuela.
>
> If the result of this remand is not initiation of preliminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period, whereupon the parties hereto may have 30 days to serve and file comments thereon, with any replies thereto due within 15 days thereafter.

24 CIT at _____, 116 F. Supp. at 1343. In other words, the initial deadline set by slip opinion 00-120 was November 20, 2000.

The defendant did not comply with the foregoing order, nor has it yet done so. Rather, its current motion (for further delay—until August 10, 2001), represents that,

> [a]t this time, an extension . . . is warranted to allow the current Assistant Secretary for Import Administration an opportunity to adequately and faithfully respond to the Court's remand order. During the original 60-day period in which the Court instructed Commerce to conduct its remand, that agency's staff undertook the analysis contemplated in this Court's opinion and order. However, the current Assistant Secretary was only nominated in February 2001 and confirmed in May 2001. Thus, he has not had an opportunity to review this Court's opinion and the staff's analysis in order to make an appropriate determination. A brief extension of time of seven days would allow the Assistant

Secretary sufficient time to render a reasoned and thoughtful decision.

If this representation genuinely reflects a change in the administering authority within the meaning of the Trade Agreements Act of 1979, as amended, in the aftermath of the 2000 presidential election, defendant's motion can be granted. However, neither this motion, nor anything else on the record of this case to date, dispels the above-quoted inability of the court to conclude that the defendant has not been dilatory and contemptuous. Indeed, this court has long warned the ITA and its counsel that they are not at liberty to ignore a remand order, "whether or not subject to further judicial review." *Smith Corona Corp. v. United States*, 13 CIT 96, 100, 706 F. Supp. 908, 912 (1989), *aff'd in pertinent part*, 915 F.2d 683 (Fed. Cir. 1990).

Ergo, while the defendant may have until the close of business on Friday, August 10, 2001, within which to respond to the above-quoted, outstanding order of the court dated September 20, 2001[1], the defendant is also hereby directed to appear before the undersigned in courtroom 3 at 11 a.m. on that day to show cause, if there be any, why it should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000.

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[1] The amount of time for comments on whatever the defendant deigns to submit, and for replies thereto, shall remain as set forth in that order.

The Clerk forthwith shall enter on the docket this memorandum and order and notify all parties to this case thereof before the close of business today.

It is so ordered.

Dated: New York, New York
August 6, 2001

/s/ THOMAS J. AQUILINO, JR.
Judge

APPENDIX B

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court Misc. No. 01-02

MATTER OF SAVE DOMESTIC OIL, INC., PLAINTIFF

v.

UNITED STATES, DEFENDANT EX REL.

SETH P. WAXMAN, LAWRENCE G. WALLACE, DAVID W. OGDEN, STUART E. SCHIFFER, WILLIAM B. SCHULTZ, DAVID M. COHEN, DOUGLAS N. LETTER, VELTA A. MELNBRENCIS, A. DAVID LAFER, GREGG COSTA, SUSHMA SONI, LUCIUS B. LAU, JAMES DORSKIND, ROBERT S. LARUSSA, TROY CRIBB, RICHARD W. MORELAND, JOHN D. MCINERNEY, BERNIECE A. BROWNE, MARK A. BARNETT AND ROBERT J. HEILFERTY

[Dated: Aug. 21, 2001]

ORDER

The court in CIT case no. 99-09-00558 having filed slip opinion 01-94, 25 CIT _____ (Aug. 6, 2001), which is incorporated herein by reference and which, among other things, directed the defendant to appear before the undersigned on August 10, 2001 to show cause why it should not be formally cited and sanctioned for contempt of the court, commencing on or about November 20, 2000; and Lucius B. Lau and Robert J.

Heilferty having appeared on behalf of the defendant in support of its motion for reconsideration of that order to show cause, which motion was denied; and the court at the hearing on August 10, 2001 having called orally and in writing upon David M. Cohen, A. David Lafer, Lucius B. Lau, Robert J. Heilferty, and all those other officers and employees of the defendant government, who, within the meaning of sections 401 and 402 of Title 18 of the United States Code, have not obeyed and/or who have willfully resisted lawful compliance with the court's order of remand of September 19, 2000, 24 CIT ___, 116 F. Supp. 2d 1324, to the International Trade Administration, U.S. Department of Commerce, to draw near and be heard as to why they, and each of them, should not be punished to the extent permitted by law; and all those officers and employees of the defendant government having been duly apprised of this charge of contempt within the meaning of Federal Rule of Criminal Procedure 42(b) and also that such a charge is very fact specific, whereupon Lucius B. Lau and Robert J. Heilferty were invited by the court to answer certain questions; and Lucius B. Lau and Robert J. Heilferty having been unwilling or unable to answer certain of those questions; and the Acting United States Attorney for the Southern District of New York having thereafter on August 10, 2001 appeared *pro hac vice* on behalf of the defendant and having offered to respond to certain unanswered questions posed by the court; and relators Schiffer and Cohen having served and filed Defendant's Response in Opposition to the Court's Motion for Specified Individuals to . . . be Punished to the Extent Permitted by Law (Aug. 17, 2001) and also Defendant's Response to the Inquiries Made by the Court at the Show Cause Hearing of August 10, 2001, (1) listing "the

officers and employees that participated in the decision to take an appeal" as Seth P. Waxman, Lawrence G. Wallace, David W. Ogden, Stuart E. Schiffer, William B. Schultz, David M. Cohen, Douglas N. Letter, Velta A. Melnbrencis, A. David Lafer, Gregg Costa, Sushma Soni and Lucius B. Lau from the United States Department of Justice and James Dorskind, Robert S. LaRussa, Troy Cribb, Richard W. Moreland, John D. McInerney, Berniece A. Browne, Mark A. Barnett and Robert J. Heilferty from the United States Department of Commerce; (2) expressing inability under the circumstances to waive the appointment of a special prosecutor; and (3) expressing inability to provide the court with a proposed trial date; and the responses provided orally at the hearing on August 10, 2001 and subsequent thereto in writing on behalf of the defendant having failed to dispel the court's duly stated and reported inability to conclude that the government has not been dilatory and contemptuous in CIT case no. 99-09-00558; Now therefore, after due deliberation, it is

ORDERED that Terence P. Stewart, Esq. of Washington, D.C. be, and he hereby is, appointed the United States Court of International Trade's Special Prosecutor to investigate and to report on the decision of the defendant and its officers and employees, including but not necessarily limited to the above-named relators, to not obey and/or to willfully resist lawful compliance with the court's interlocutory order of remand of September 19, 2000, 24 CIT ____, 116 F. Supp. 2d 1324, to the International Trade Administration, U.S. Department of Commerce, and it is further hereby

ORDERED that the special prosecutor file a written report thereon with the court as soon as is practicable,

together with any recommendation as to who, if anyone, should stand trial for criminal contempt of the court in CIT case no. 99-09-00558; and it is further hereby

ORDERED that the Clerk of the Court determine the current business mailing address of each of the above-named relators and send to each of them at his or her particular such address a copy of this order by certified mail, return receipt requested, and it is further hereby

ORDERED that each of the parties to CIT case no. 99-09-00558 be provided by the Clerk of the Court with notice of entry of this order in regular course.

Dated: New York, New York
August 21, 2001

/s/ THOMAS J. AQUILINO, JR.
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Miscellaneous Docket No. 679

IN RE UNITED STATES, PETITIONER

ON PETITION FOR WRIT OF MANDAMUS

[Filed: Aug. 23, 2001]

Before RADER, *Circuit Judge.*

ORDER

The United States petitions for a writ of mandamus to direct the Court of International Trade to halt criminal and contempt proceedings against several attorneys from the Department of Justice appearing before the court.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Any respondent who wishes to respond may do so within 10 days.

(2) Further proceedings are temporarily stayed.

8/23/01
Date

/s/ RANDALL R. RADER
RANDALL R. RADER
Circuit Judge

cc: David Cohen, Esq.
Robert E. Burke, Esq.
Charles Owen Verrill, Esq.
Joseph W. Dorn, Esq.
Kermit W. Almstedt, Esq.
Bradford L. Ward, Esq.
Court of International Trade, Judge
Court of International Trade, Clerk